STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Hood, P.J., and Meter and Whitbeck, JJ.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

ERWIN HARRIS, a/k/a GERRONE TAYLOR, and a/k/a TERRALD RAY HARRIS,
Defendant-Appellant.

Supreme Court No. 119862

Court of Appeals No. 222468

Lower Court No. 98-11081 FC

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

Oral Argument Requested

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COUNTERSTATEMENT OF JURISDICTION

Plaintiff-Appellee concurs with Defendant-Appellant's Statement of Jurisdiction, and additionally notes that MCR 7.302(F)(3) vests jurisdiction in this Court.

COUNTERSTATEMENT OF QUESTIONS INVOLVED

I. The legislature has plainly intended to deter the use of firearms and permit principal criminal liability for even the slightest assistance in, or encouragement of, criminal activity. Should this Court promulgate a rule consistent with legislative intent, a rule that proscribes even the slightest assistance in, or encouragement of, the possession of firearms during the commission of a felony?

Plaintiff-Appellee answers, "Yes."
Defendant-Appellant answered, "No."
The trial court was not presented with this question.
The Court of Appeals answered, "Yes."

II. Was there sufficient evidence for the jury, instructed consistent with *Johnson*, to convict Defendant; and, under any analysis that gives proper effect to the relevant legislative intent, was there sufficient evidence to convict Defendant of Felony-Firearm on an Aiding and Abetting theory?

Plaintiff-Appellee answers, "Yes."
Defendant-Appellant answered, "No."
The trial court answered, "Yes."
The Court of Appeals answered, "Yes."

COUNTERSTATEMENT OF FACTS

Plaintiff-Appellee concurs with Defendant-Appellant's Statement of Facts with minor exception. As said exception amounts to a comment on the appropriate standard of review, Appellee will reserve response until the Argument section of this brief.

SUMMARY OF ARGUMENT

This Court has granted leave to appeal in this case to consider two things: "whether there is sufficient evidence to convict the defendant of violating 750.227b, and whether the decision in *People v Johnson*, 411 Mich 50 (1981), should be overruled or modified."[1]

The prosecution's theory at trial was that Defendant was guilty of Felony-Firearm as an Aider and Abettor. The jury was properly instructed on this theory of guilt consistent with this Court's previous holding in *Johnson*. The prosecution presented sufficient evidence on which a rational jury could, and did, convict Defendant.

As for the future of *People v Johnson*, it is evident from previous appellate application of that case that it has led not only to the performance of unnecessary gymnastics in order to uphold sound Aider and Abettor Felony-Firearm convictions, but it has also created loopholes frustrating otherwise plain legislative intent. Therefore, this Court should overrule or modify *Johnson*. In so doing, this Court should settle any debate over whether Defendant was properly convicted of Aiding and Abetting Felony-Firearm in the affirmative.

In this brief, Appellee will first discuss the underpinnings of the Felony-Firearm and Aiding and Abetting statutes and proffer an inquiry that embodies those underpinnings more thoroughly than the overly narrow rule of *People v Johnson*. Appellee will then argue that under this more accurate inquiry the evidence was sufficient to convict Defendant of Aiding and Abetting Felony-Firearm, just as it was sufficient under the defective test dutifully followed since *Johnson*.

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[1] Joint Appendix, 21a, 22a.

ARGUMENT

I. The legislature has plainly intended to deter the use of firearms and permit principal criminal liability for even the slightest assistance in, or encouragement of, criminal activity. This Court should promulgate a rule consistent with legislative intent, a rule that proscribes even the slightest assistance in, or encouragement of, the possession of firearms during the commission of a felony.

Standard of Review

This Court is examining whether to overrule or modify its prior decision in, or subsequent application of, *People v Johnson.*[2] As *Johnson* addressed the Felony-Firearm and Aiding and Abetting statutes, the analysis will likewise address those statutes. During its analysis, this Court may review *de novo* the statutes at issue in order to afford them an interpretation consistent with legislative intent and practical application.[3]

As for overruling or modifying *People v Johnson*, Appellee will argue below that this Court should do exactly that. Appellee is mindful of the important principle of *stare decisis*. And while this Court never overrules or modifies a case lightly, it is not merely appropriate, rather it is this Court's duty, to overrule a case when it becomes apparent that the basis of that case is erroneous.[4] This Court must not be shackled by *stare decisis* when additional damage to clear legislative intent would ensue from robotic application of that doctrine.

Discussion

Explicit in this Court's grant of leave to appeal is review of the holding in *People v Johnson*, which instructed that "To convict one of aiding and abetting the commission of a separately charged crime of carrying or having a firearm in one's possession during the commission of a felony, it must be established that the defendant procured, counseled,

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[2] People v *Johnson*, 411 Mich 50 (1981).
[3] *People v Law*, 459 Mich 419, 423 (1999)
[4] *People v Kazmierczak*, 461 Mich 411, 425 (2000). [Citations omitted.]

aided, or abetted and so assisted in obtaining the proscribed possession, or in retaining such possession otherwise obtained."[5]

Implicit in this Court's grant of leave is review of two statutes: the "Felony-Firearm" statute which imposes criminal liability on "A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony,"[6] and the "Aider and Abettor" statute which allows that "Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense."[7] This brief begins with consideration of the Felony-Firearm statute.

Although this Court was considering the Felony-Firearm statute within a Double Jeopardy analysis when it espoused the legislative intent behind it in *Wayne County Prosecutor v Recorder's Court Judge*,[8] this Court's finding is no less relevant to the Aiding and Abetting analysis. What this Court found was that the core rationale behind the Legislative decree was "to deter the use of guns."[9] This rationale was so obviously important to the Legislature that it established a punishment scheme virtually unique in its severity; automatic imprisonment which may not be suspended, and which is additional and consecutive to any underlying punishment.[10]

Giving effect to this rationale when one defendant commits one felony with one firearm is a straightforward endeavor, requiring no further analysis. Given the facts of

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[5] *People v Johnson*, 411 Mich 50, 54 (1981). [citations omitted]
[6] MCL 750.227b.
[7] MCL 767.39.
[8] *Wayne County Prosecutor v Recorder's Court Judge*, 406 Mich 374 (1979).
[9] *Wayne Pros*, 406 Mich at 391.
[10] MCL 750.227b.

this case, and against the backdrop of the Aider and Abettor statute, additional consideration is required. Thanks to this Court's decision in *People v Palmer*,[11] the legislative intent behind the Aider and Abettor statute is as clear as that behind the Felony-Firearm statute. The Aider and Abettor statute "abolish(ed) the common-law distinction between accessories before the fact and principals so that one who counsels, aids or abets in the commission of an offense may be tried and convicted as if he had directly committed the offense."[12]

To this point, the language of the two statutes, along with their respective rationales, has been set forth. How these statutes are applied together is the next step in the analysis. Appellee submits that "Every person concerned in the commission of the carrying or possession of a firearm when he or she commits a felony" should be criminally liable for Felony-Firearm under the Aider and Abettor statute.[13] Of course this submission is nothing more than a merged reading of the two statutes. But it is that straightforwardness which ensures the proper application of legislative intent and both statutes' plain meaning.

As the next step of this analysis, review of the plain meaning of the joint reading is in order. Review of the dictionary definition, while permissible within the canons of statutory construction,[14] is probably not necessary to discern the meaning of "every person." It may not even be necessary to examine "concerned," though if one were to consult the dictionary one would find that its primary definition is "interested and

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[11] *People v Palmer*, 392 Mich 370 (1974).
[12] *Palmer*, 392 Mich at 378.
[13] See MCL 767.39 and MCL 750.227b.
[14] *People v Disimone*, 251 Mich App 605, 610 (2002).

involved."[15] The relevant meaning of "concerned" may also be divined from subsequent terms in the Aider and Abettor statute; one is concerned in the commission of an offense if one procures, counsels, aids, or abets in its commission.[16] Since the amount or degree of procurement, counsel, aid, or abetting is immaterial, even the slightest amount of any of these may be sufficient to concern oneself with the commission of a crime.[17]

Moving on then to the term "commission," Appellee submits that the relevant, and unsurprising, dictionary definition is "the act or process of committing or perpetrating."[18]

Which brings us to "carrying or possession." The dictionary offers little additional insight: "to carry" is "to have or keep on one's person;" "to posses" is "to have as property."[19] Case law sheds additional light on the concept of possession. Possession is something that can be aided and abetted.[20] Possession is an act, as opposed to merely a status.[21] Further, given the legislative intent to proscribe the use of firearms and thereby reduce the possibility of injury to victims, passersby and police resulting from such use,[22] it is only proper to conclude that the proscription against possession includes a proscription against use. In fact, it is reasonable to link "possession" to "use" as one would "*malum prohibitum*" to "*malum in se*." This is so because, as we have already seen, the use of a firearm during a felony is the inherent evil sought to be prevented by the Felony-Firearm statute. Even though one who benignly possesses, without using or

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[15] *Webster's II New College Dictionary* (1986).
[16] MCL 767.39.
[17] *Palmer*, 392 Mich at 378.
[18] *Webster's II New College Dictionary* (1986).
[19] *Webster's II New College Dictionary* (1986).
[20] *People v Doemer*, 35 Mich App 149, 151 (1971).
[21] *Id.*, at 152.
[22] *People v Dillard*, 246 Mich App 163, 171 (2001).

even intending to use, a firearm during a felony violates the statute, it is exactly that use or intent to use which is the evil that the statute addresses.[23]

As a counter-example illustrating a circumstance that falls outside aiding and abetting possession, the Court of Appeals' decision in *People v Doemer* instructs that "mere presence" is insufficient to aid and abet possession.[24]

The last phrase in the deconstruction of Appellee's inquiry is "when he or she commits a felony." This phrase more or less speaks for itself (and includes "aids and abets in the commission of a felony"), but it also summons consideration of an additional legislative intent. Under the rationale that absence of a firearm may dissuade a potential felon from committing even the underlying felony, the Felony-Firearm statute serves to deter not only the use of guns, but also the underlying felony itself.[25] So it is not merely the presence of the firearm, rather it is that firearm's relationship to the underlying felony that bears consideration.

Before moving on to the holding of *People v Johnson*, we first turn to the evolution of caselaw on which this Court in *People v Johnson* relied. The *Johnson* Court cited the Court of Appeals' decision in *People v Doemer*, which in turn relied on three California cases for its proposition that "the act or encouragement must be done knowingly with the intent to aid the possessor obtain or retain possession."[26] Review of the three California cases indicates that the "obtain or retain (actually obtain and

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[23] Benign possession of a firearm seems perhaps counterintuitive, and indeed juries have often rejected defendants' testimony minimizing their intent as incredible. But, benign possession is surely what the statute prohibits.

[24] *Doemer*, 35 Mich App at 152.

[25] *Dillard*, 246 Mich App at 171.

[26] *Johnson*, 411 Mich at 54; citing *Doemer*, 35 Mich App at 152; which in turn cites *People v Henderson*, 121 Cal App 2d 816 (1953); *People v Solo*, 8 Cal App 3d 201 (1970); and *People v Francis*, 71 Cal App 2d 66 (1969).

possess)" phrase first showed up in *Henderson*, several years before the other California cases or *Doemer*.

In *Henderson*, a Mr. Domingo was in the driver's seat of a car with Mr. Henderson in the passenger seat. Police observed a suspected narcotics transaction between the passenger-Henderson and a pedestrian and subsequently stopped the car. Police observed what turned out to be narcotics in the passenger's hands. Mr. Domingo admitted to police that he had driven his passenger to "score for a capsule of H(eroin)."[27] He was thus more than "merely present." Indeed, the California Court upheld Mr. Domingo's conviction for possession of heroin on the theory of aiding and abetting, relying upon Mr. Domingo's "admission (that) he clearly aided and abetted his codefendant in obtaining and possessing the capsule of heroin."[28] Here, then, seems to be the genesis of the "obtain or retain" test eventually found in *Johnson*. However, at no point in its analysis did the California Court suggest that this particular fact pattern was the sole circumstance in which one can aid and abet possession. Likewise, it did not hold that "obtain or possess" was the exclusive permissible legal test for aiding and abetting possession.

However, on similar facts in *Doemer*, this state's Court of Appeals took California's analysis, that aiding and abetting "obtaining and possessing" satisfied that state's aider and abettor liability, and changed it into the exclusive mandate that one "must...aid the possessor obtain or retain possession" in order to be guilty of aiding and abetting possession of a controlled substance.[29] Obviously, aiding and abetting one in obtaining or retaining possession correctly amounts to "being concerned in the

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[27] *Henderson*, 121 Cal App 2d at 817.
[28] *Id.*, at 817-818.
[29] *Doemer*, 35 Mich App at 152.

commission of" that possession, but it is hardly the only way to concern oneself in the commission of a possessory crime. To conclude otherwise is to narrow the applicability of the Aider and Abettor statute contrary to the plain meaning of that statute and contrary to the legislative intent behind both the Aider and Abettor and the Felony-Firearm statutes.

Which brings us to this Court's holding in *People v Johnson*, in which the improvidently narrow mandate above was extended from aiding and abetting possession of controlled substances to aiding and abetting Felony-Firearm.[30] Thus, to the error of imposing the narrow and unnecessary mandate of aiding and abetting "obtaining or retaining" an item was added the additional impropriety of imposing such narrowness upon the Felony-Firearm statute. That the additional impropriety is its own error rests in the difference between narcotics and firearms, and from the difference between statutes proscribing the possession of narcotics and the Felony-Firearm statute. For while the Legislature clearly intended to deter the use of both narcotics and firearms, the former is to protect, for example, one who uses the narcotic, while the latter is primarily to protect the person(s) against whom a firearm would be used.[31] To ignore the acute legislative intent behind the Felony-Firearm statute, but absent from narcotics statutes, by limiting the ways in which one my aid and abet in its commission is to undercut the rationale on which it is based; it is to conclude that the Legislature only intended to deter some, but not all, of the use of firearms.

Therefore, while this Court was correct to recognize the issue in *Johnson* as one of aiding and abetting a possessory crime, it unfortunately endorsed the unreasonably

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[30] *Johnson*, 411 Mich at 54.
[31] *Dillard*, 246 Mich 171.

narrow *Doemer* application of the Aider and Abettor statute as it applies to the Felony-Firearm statute by reframing it as involving aiding and abetting only acquisition or retention, instead of aiding and abetting possession or carrying in general.[32]

The more proper analysis, and the analysis presently urged upon this Court, is one that gives full effect to the obvious and simultaneous legislative intent of deterring the use of firearms by both principal offenders and aiders and abettors.

The propriety of overruling or modifying *Johnson* is also clear after review of strained analyses on which appellate courts have had to rely to reach results harmonious with the legislative intent stated above, while simultaneously attempting to stay within the narrow confines of the *Johnson* rule. In *People v Baker*, which cited *Johnson*, the Court of Appeals affirmed a plea-based Felony-Firearm conviction of an Aider and Abettor.[33] The victim in that case noted that both the defendant and his cohort were coequal participants in the armed robbery, the only difference being that one of them held the gun and the other did not.[34] That victim even stated what the Legislature undoubtedly knew when it codified the Aider and Abettor statute: that the difference between who had the gun and who did not have the gun was not a significant one.[35]

Now, before Baker and his co-defendant robbed the victim in that case, the co-defendant brought the firearm to Baker's house. In fact, Baker had the gun (possessed it) and he was looking at it while at his house. Baker may or may not have carried the gun to the car when they went to rob the victim (we may therefore assume he did not), but at

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[32] *Johnson*, 411 Mich at 54.
[33] *People v Baker*, 115 Mich App 720 (1982).
[34] *Baker*, 115 Mich App at 722.
[35] *Id.*

that time he had the intent to use the gun if necessary during a hold-up.[36] When they got out of Baker's car, Baker's partner had the gun (and the partner possessed the gun at every relevant time thereafter). Baker answered in the affirmative when asked during the plea "was the gun ever used in order to help you get what you wanted?"[37]

Of course the Legislature intended for Mr. Baker to be liable for Felony-Firearm. That victim's common-sense recognition of the co-equal culpability is surely what the Legislature had in mind when it proscribed Aider and Abettor liability and Felony-Firearm liability. The Court of Appeals recognized this as well, opining "the defendant participated in the planning and commission of the robbery" as the primary basis for upholding Baker's conviction.[38] That that court felt it necessary to add a reference to the fact that Baker "saw and handled the firearm prior to the crime with an awareness of the use to which it would be put" speaks not to the wisdom, but rather to an only reluctant application, of the stated test of *Johnson*.[39] Put another way, reversing Baker's conviction had he not briefly handled the firearm before they even left his house would have done obvious violence to legislative intent. Consider finally the sensibility of that court's paraphrased holding absent the fortuitous and factually irrelevant touching of the firearm: Baker participated in the commission of the offense and he had an awareness of the use to which the firearm would be put.[40] This would have been the more pure recognition of Aider and Abettor liability, and is instructive on how this Court should treat *Johnson* in this appeal.

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[36] *Id.*, at 723.
[37] *Id.*, at 724.
[38] *Id.*
[39] *Id.*
[40] *Id.*

In the same year, a panel of the Court of Appeals held in *People v Purofoy* that merely giving the general Aiding and Abetting jury instruction, coupled with the Felony-Firearm jury instruction, was sufficient.[41] In that case, Purofoy remained convicted of Felony-Firearm when he (apparently) held a knife while his cohort held a firearm as they robbed a victim. Appellee argues that that panel of the Court of Appeals recognized by omission that the *Johnson/Doemer/Henderson* rationale does not provide the sole avenue of Aider and Abettor Felony-Firearm liability when it endorsed the use of the general Aider and Abettor jury instruction. At its essence, then, Aiding and Abetting the crime of Felony-Firearm remains analytically identical to Aiding and Abetting any other felony.

We now turn to the application of *Johnson* to the case at bar. In affirming Defendant's convictions, the majority opinion of the Court of Appeals relied on the facts that Defendant drove his armed partner to the robbery and that Defendant repeatedly urged his accomplice to shoot one of the victims.[42] The majority felt it necessary to distinguish the case of *People v Eloby (After Remand)*,[43] explicitly concluding that Aiding and Abetting Felony-Firearm may be perpetrated via a broader range of conduct than merely aiding and abetting one's cohort in obtaining or retaining possession of the firearm when it noted that "defendant repeatedly urged (his partner) to shoot Parson (the cashier) during the course of the robbery."[44] But for its cumbersome analysis (which was nevertheless consistent with legislative intent), the majority would have been compelled

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[41] *People v Purofoy*, 116 Mich App 471, 481 (1982).
[42] Joint Appendix, 13a-14a.
[43] *People v Eloby (After Remand)*, 215 Mich App 472 (1996). As for the disputed rule in that case, whether knowingly driving one's armed partner to a felony will suffice to expose one to Felony-Firearm liability, Appellee submits that overruling or modifying *Johnson* will include overruling or modifying *Eloby* to the point that such conduct should become a question of fact for the jury.
[44] Joint Appendix, 13a.

to formally disagree with *Eloby*, a sentiment the majority made explicit.[45] Of course such disagreement would have been, at its essence, a disagreement with *Johnson.*

The dissent, interestingly enough a member of the unanimous panel in the companion case *People v Clarence Moore*, took the majority to task on a number of points including its interpretation of *Eloby*.[46] Without regard to the particulars of *Eloby*, it is exactly skirmishes like these that illustrate the need for this Court to promulgate a rule consistent with legislative intent as already recognized by various jurists. The alternative is a future of additional skirmishes and frustration of legislative intent.

In addition to the *Eloby*-related sparring, and also instructive to Appellee's analysis, is the dissent's reliance on *People v Baker*, a case already addressed in this brief. The dissent focused solely on the factual irrelevancy that Baker handled the firearm and gave it to his co-defendant before they left to commit the crime, while ignoring that the *Baker* court offered that rationale as an afterthought.[47] By ignoring *Baker's* primary rationale, the dissent ignored legislative intent in favor of allegiance to an unnecessarily narrow rule.

Immediately following its misapplication of *Baker*, the dissent's analysis reveals additional insight into why the *Johnson* rule it was faithfully trying to apply is contrary to legislative intent. Indeed, the dissent actually concluded that Defendant counseled his partner to use the firearm, instead of to retain or obtain the firearm.[48] Since it has already been established that the legislative intent behind the Felony-Firearm statute is to deter

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[45] Joint Appendix, 14a, n5.
[46] Joint Appendix, 17a-20a.
[47] Joint Appendix, 19a.
[48] Joint Appendix, 19a.

the use of firearms,[49] and since the dissent below agreed that Defendant counseled the actual possessor of the firearm to use it, then the dissent necessarily relied on a test that rendered a result that was plainly contrary to the core rationale for the statute.

The dissent went on to offer additional facts that would, in its opinion, satisfy the narrow rule in *Johnson*.[50] For instance, the dissent would have been satisfied had Harris told his cohort where to go to purchase a firearm. But the dissent offers no temporal restriction with its hypothetical. Apparently, for the dissent, had Harris told his cohort where to buy a firearm several days before the robbery, that additional factor would have been sufficient under the *Johnson* "obtain or retain" test; yet screaming at his partner to shoot a victim during the violent felony would not. Appellee submits that Aider and Abettor liability for Felony-Firearm does not demand such gymnastics or countenance the attendant absurd results.

Continuing, none of the other fictional suggestions of the dissent's, such as Defendant hypothetically warning his partner that he was about to drop the gun,[51] is as egregious as what actually happened. Defendant's screaming at his partner to shoot a victim therefore heightened the risk of firearm use more than any of the dissent's suggested alternative fact-patterns. Thus we are faced in the case at bar with facts that illustrate a clear deficiency in the *Johnson* test. In its effort to faithfully apply the *Johnson* test, the dissent actually offered important insight into that case's failure to adequately perpetuate legislative intent by leaving open certain loopholes.

On his own behalf, Appellant in his brief relies merely on the use of italics to emphasize the "carrying" of a firearm as the primary evil sought to be deterred by the

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[49] *Wayne Pros*, 406 Mich at 391.
[50] Joint Appendix, 19a.
[51] Joint Appendix, 19a.

Legislature.[52] However, in the same block-quote selectively italicized by Appellant, we find the actual legislative motivation of deterring the use of guns, not merely the carrying of them, expressed in *Wayne County Prosecutor*.[53] Appellant even cites *People v Dillard* for the proposition that "the Legislature intended the felony-firearm statute to reduce the possibility of injury to victims, passersby, and police officers posed by a criminal's utilization of a firearm..."[54] With this proposition Appellee could not agree more, and Appellee therefore submits that by increasing the risk of firearms use and the resulting personal injury or death, Defendant brought himself into the purview of the relevant statutory proscriptions.

And, contrary to Appellant's intimation in his brief that any statute passed subsequent to the Aider and Abettor statute must explicitly state whether Aider and Abettor liability is available,[55] Appellee submits that had the Legislature intended to preclude Aider and Abettor liability from the Felony-Firearm statute, it could easily have done so.[56] Especially where "the Legislature is presumed to know of and legislate in harmony with existing laws,"[57] and must have therefore been aware that the Aider and Abettor statute had been applied to virtually every section of the penal code since its passage. Indeed, the Legislature specifically excepted certain other statutes from the reach of the Felony-Firearm statute. This Court recognized as much in *People v Mitchell*, finding that the Felony-Firearm statute explicitly precludes liability in connection with four and only four discrete statutes.[58] The collection of four statutes listed in the Felony-

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[52] Appellant's Brief, p10, block quote.
[53] Appellant's Brief, p10. See also *Wayne Pros*, 406 Mich at 391.
[54] Appellant's Brief, p10. See also *People v Dillard*, 246 Mich App 163, 171 (2001).
[55] Appellant's Brief, p9.
[56] *Dillard*, 246 Mich App at 168.
[57] *People v Cash*, 419 Mich 230, 241 (1984).
[58] *People v Mitchell*, 456 Mich 693, 696-697 (1998).

Firearm statute does not include the Aider and Abettor statute as an exception.[59] Thus, there is no support for the conclusion that the Legislature intended to preclude Aider and Abettor prosecutions for Felony-Firearm, just as there is no support for the position that no one may be prosecuted as an Aider and Abettor under any statute passed subsequent to the Aider and Abettor statute unless that subsequent statute explicitly permits application of Aider and Abettor liability. Appellant's argument is, quite simply, absurd.

Appellant's positions therefore fail to overcome the language of the two statutes and the clear legislative purposes behind each. Even the dissent, below, illustrates the fecklessness of the *Johnson* rule it nevertheless remained faithful to. This Court should, given the opportunity before it, endeavor to rescue future appellate jurists from the burden placed upon them by *Johnson*. The Legislature intends that every person concerned in the commission of the carrying or having in his or her possession a firearm when he or she commits a felony be prosecuted, and on sufficient evidence convicted, of Felony-Firearm. This Court should therefore overrule or modify *Johnson* in favor of a decree that gives effect to that intent.

II. There was sufficient evidence for the jury, instructed consistent with *Johnson*, to convict Defendant. Under any analysis that gives proper effect to the relevant legislative intent, there was more than sufficient evidence to convict Defendant of Felony-Firearm on an Aiding and Abetting theory.

Standard of Review

When determining whether sufficient evidence has been presented to sustain a conviction, a "court must review the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential

[59] MCL 750.227b.

elements of the crime were proven beyond a reasonable doubt."[60] This maxim requires a bit of deconstruction due to the posture of this case, for exactly what the "essential elements of the crime" are is part of this Court's inquiry whether to overrule or modify *People v Johnson*. Appellee will argue that the evidence was sufficient under the more narrow, *Johnson*, rule; and therefore that the evidence must satisfy any rule which recognizes the legislative intent that Aider and Abettor liability for Felony-Firearm attaches to more conduct than merely helping a co-defendant obtain or retain a firearm.

Discussion

Before addressing the "essential elements" portion of the test for sufficiency of the evidence, Appellee must comment on the "in the light most favorable to the prosecution" portion. While not rampant, Defendant's Statement of Facts occasionally drifted out of the proper light and into a light tending to minimize his culpability. For example, that statement includes the sentence "When they left the station, Mr. Harris decided to drive home to Detroit and get rid of Eugene Mays (the gunman) as quickly as he could."[61] While that may be what Defendant testified to (and most of the rest of Defendant's story which was obviously not believed by the jury was indeed more properly introduced in his brief with phrases like "Mr. Harris testified that…), it is fairly clearly not what the jury concluded nor is it in a light most favorable to the prosecution. In the proper light, of course, Defendant fled the scene of his violent crimes as quickly and dangerously as possible.

More troubling is the similar drift occasioned by the dissenting member of the Court of Appeals panel below. For under genuine review of the record in the light most

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[60] *People v Burgenmeyer*, 461 Mich 431, 434 (2000). [citation omitted]
[61] Appellant's Brief, p4.

favorable to the prosecution, it matters little that Defendant "had a somewhat different account of what occurred at the gas station," as the dissent took pains to note.[62] Frankly, the remainder of that paragraph of the dissent is not even neutral, let alone in the light most favorable to the prosecution.[63]

Review of the record from the perspective of the victim closest to Defendant during most of the robbery easily establishes the essential elements of Aiding and Abetting Felony-Firearm. From that record it is fair to conclude that Defendant cased the gas station and neutralized the customer-victim before his gun-toting partner entered and engaged the clerk-victim.[64] It is also fair to conclude that when the robbery was not producing money as Defendant hoped, he repeatedly screamed (not merely "told," as Appellant's brief would have a reader believe[65]) at his cohort to pop (shoot, murder) the clerk-victim.[66] In fact, it was Defendant's screaming that heightened the dangerousness of the situation in at least the customer-victim's mind, for the customer began screaming at the gunman himself, pleading with the gunman not to kill the clerk.[67]

Given these facts, taken from a review of the record under the light most favorable to the prosecution, it is plain that the prosecution offered sufficient evidence on the issue whether Defendant Aided and Abetted Felony-Firearm, even if the inquiry is restricted by the narrow test in *Johnson*.

As the Court of Appeals found within the constraints of *Johnson* below, "defendant repeatedly urged Mays to shoot Parson during the course of the robbery…this

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[62] Joint Appendix, 16a.
[63] Joint Appendix, 16a.
[64] Joint Appendix, 25a.
[65] Appellant's Brief, p2. Of course, even if Appellant's minimizations were true it would not help his cause. "Telling" or "screaming," even the slightest encouragement is adequate to incur Aider and Abettor liability. *Palmer*, 392 Mich at 378.
[66] Joint Appendix, 26a.
[67] *Id.*

conduct 'counseled' Mays in the retention of the firearm during the crime" of the armed robbery of the cashier.[68] Additionally, the majority below intimated that but for its delicate treatment of the *Eloby* precedent, it felt strongly enough about its conclusion as to the Felony-Firearm conviction as it related to the customer that it may have formally disagreed with *Eloby*.[69] Without needing to address the conflict, however, the majority correctly held that Defendant's collaboration with the gunman before the actual robbery satisfied the *Johnson* test.[70] Though not explicitly referenced by the majority, Appellee submits that the record supports the conclusion that Defendant's screaming had the effect of paralyzing the customer-victim with fear of the firearm and the principal firearm possessor. In this way, Defendant aided and abetted in the retention of the firearm by his compatriot. Therefore, for the above reasons, Defendant was properly convicted under the narrow *Johnson* test, as expressed to the jury in the specialized jury instructions which incorporate that test.[71]

As the Court of Appeals recognized in *People v Purofoy*, mentioned above on page 12, it should not have been necessary to instruct the jury using anything other than the traditional Felony-Firearm instruction and the traditional Aider and Abettor instruction.[72] And given the above analysis on the improprieties behind the overly narrow rule perpetuated by *Johnson*, and the need for this Court to overrule or modify that rule, the proper conclusion is that consistent with legislative intent the jury below should have been instructed such that a broader range of conduct would have resulted in criminal liability. In other words, every single defendant properly convicted (on

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[68] Joint Appendix, 13a.
[69] Joint Appendix, 14a.
[70] *Id.*
[71] Joint Appendix, 50a-51a.
[72] *Purofoy*, 116 Mich App at 481.

sufficient evidence) under *Johnson* will also be properly convicted under the analysis that replaces *Johnson*.

As already set forth in section I., the correct inquiry for Aiding and Abetting Felony-Firearm should be whether a person was concerned in the commission of the carrying or possessing a firearm when during the commission of a felony. And though the ultimate arbiter of this inquiry will be a jury, whether sufficient evidence has been presented will employ the same inquiry.

We are left then with a test for Aiding and Abetting Felony-Firearm which embodies legislative intent and which asks whether Defendant was concerned with the commission of Felony-Firearm. Defendant who drove his colleague and a long-gun (albeit short-barrelled) – not a small, easy-to-conceal handgun – to the crime scene. Defendant who entered the gas station before his gunman in order to "case" it (under the guise of asking for directions), who went out to tell his gunman the coast was clear, who preceded his gunman upon re-entry in order to neutralize the customer, who then took the customer's wallet, who screamed at his trigger-man to shoot the cashier, who took property from the cashier and drove himself, his trigger-man, and the long-gun away at high speed. Appellee submits that it is not hard to imagine the customer panicking when he thought shots were imminent. And it is equally easy to imagine such panic resulting in one or multiple homicides. That no one was killed, indeed that no shots were fired, is both fortunate and irrelevant. Irrelevant in that the legislature intended to deter the risk of such harm, but has never intended such harm to be a prerequisite to Felony-Firearm liability.

On the record before this Court there is plainly sufficient evidence to support Defendant's convictions for Felony-Firearm under both the narrow *Johnson* test and any test consistent with legislative intent this Court should set forth.

RELIEF REQUESTED

Plaintiff-Appellee respectfully requests this Court find that there is sufficient evidence to convict Defendant of violating MCL 750.227b as an Aider and Abettor. Appellee additionally requests this Court overrule or modify its holding in *People v Johnson*, 411 Mich 50 (1981), in favor of a holding which gives effect to the legislative intent behind both the Felony-Firearm and the Aider and Abettor statutes.

Respectfully submitted,
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Dated: